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IMMIGRATION LAW

BUTROS v. INS: THE FOLLY OF FINALITY AS AN ABSOLUTE BAR TO SEEKING § 212(c) RELIEF FROM DEPORTATION

I. INTRODUCTION

In *Butros v. INS*,¹ the Ninth Circuit, sitting *en banc*, held that an alien who has established lawful permanent resident (hereinafter "LPR") status in the United States may seek discretionary relief² from deportation so long as his case may be appealed to the Ninth Circuit, or reopened or reconsidered by the Board of Immigration Appeals ("BIA" or "Board," hereinafter used interchangeably).³ In effect, this ruling does not recognize the finality of a deportation order until the alien physically

1. 990 F.2d 1142 (9th Cir. 1993) (per Noonan, J.; Fernandez, Beezer, Hall, JJ., concurring; Trott, Brunetti, JJ., dissenting).

2. Discretionary relief from an order of deportation may be granted at the discretion of the Attorney General. It may be sought pursuant to § 212(c) of the Immigration and Nationality Act [hereinafter, "INA"]. Section 212(c) is codified as 8 U.S.C. § 1182(c) (1988). It provides in pertinent part:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General

The statute was specifically designed to afford relief to aliens in exclusion, and not deportation, proceedings. Case law has extended its application to deportation proceedings. See, e.g., *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Marin*, 16 I. & N. Dec. 581 (1978); see *infra* notes 56-66 and accompanying text discussing the evolution of § 212(c) to encompass deportation proceedings.

3. *Butros*, 990 F.2d at 1144-46. Motions to reopen or reconsider are governed by BIA regulations. See 8 C.F.R. § 3.2 (1992); see *infra* note 26 for the text of the governing regulation.

leaves the United States.⁴ The Ninth Circuit's ruling allows aliens to seek relief not only from deportation orders issued by an immigration judge but, more importantly, from deportation orders which are "administratively final".⁵ The Ninth Circuit's ruling is, however, limited to those aliens who have already maintained LPR status for seven years.⁶

Prior to *Butros*, the Ninth Circuit, in *Gonzales v. INS*,⁷ barred such discretionary relief under the rationale that (1) the BIA's initial denial of relief rendered the deportation order administratively final; (2) that an administratively final deportation order terminated the lawfulness of the alien's domicile in the United States by divesting the alien's LPR status; and (3) that § 212(c) requires an alien to maintain present LPR status.⁸

Butros overruled *Gonzales*.⁹ The Ninth Circuit explained that the fallacy of *Gonzales* was the belief that what is final for certain administrative purposes is final for all purposes.¹⁰ The *Butros* court reasoned that so long as the BIA could reopen or reconsider an administratively final decision on its *own* motion, an *alien's* motion could not be summarily denied under the pretense that the deportation order had been finalized.¹¹

Although the result is fair on the *Butros* facts,¹² the Ninth

4. See 8 C.F.R. § 3.2. ("A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceeding after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion."); see *infra* note 26 for the full text of this regulation.

5. An immigration judge's deportation order becomes administratively final when affirmed by the BIA. See *Matter of Lok*, 18 I. & N. Dec. 101, 105 (1981).

6. *Butros*, 990 F.2d at 1146 (declining to decide whether the *Butros* rule would be applied to aliens who had not maintained LPR status for seven years).

Section 212(c) requires that an alien have established a seven-year lawful domicile to be eligible for discretionary relief. The Ninth Circuit recognizes a seven-year lawful domicile only if the alien possessed LPR status for the seven years. See, e.g., *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979).

7. 921 F.2d 236 (9th Cir. 1990).

8. See *id.* at 238-41.

9. *Butros*, 990 F.2d at 1145.

10. *Id.*

11. *Id.*

12. Evidence suggests that *Butros*' inability to receive discretionary relief at the initial hearing resulted through his original lawyer's incompetence. See *infra* note 25 presenting such evidence.

Circuit's new rule is problematic. By delaying the point at which a deportation order is deemed final and limiting their holding to aliens with seven or more years of LPR status, the Ninth Circuit has created the potential for unintelligible distinctions and incongruous results.¹³ The ruling has also added another branch to the multi-faceted circuit split created by inconsistent judicial interpretation of § 212(c).¹⁴

Through an analysis of the chain of reasoning that led the court to the *Butros* decision, this article will demonstrate how abolishing the requirement that aliens possess present LPR status would have achieved the same fair result without fostering the circuit split or spurring on unintended, unwanted results. The suggested approach differs from the Ninth Circuit's rule in two significant ways. First it *would* change an alien's status from LPR to non-LPR upon an administratively final deportation order. Second, and more importantly, it *would not absolutely bar non-LPR aliens from simply seeking § 212(c) relief*.¹⁵

II. FACTS

Naim Butros entered the United States in February 1975 as

Although the Ninth Circuit allowed Butros the opportunity to seek discretionary relief, Butros would then have the heavy burden of convincing the BIA that his motion to reopen and reconsider should be granted. *See* Matter of Coelho, Int. Dec. 3172 (BIA, Apr 30, 1992). If the motion were granted, Butros would then have to convince an immigration judge that he actually deserved discretionary relief. Whether Butros ultimately receives relief is immaterial. What is important is that he was given the *opportunity* to make his arguments and that the ultimate decision will be based upon the merits of his case and not upon procedural technicalities.

13. *See infra* notes 244-49 and accompanying text discussing the potential problems created by the *Butros* rule.

14. *See infra* notes 250-60 and accompanying text describing the present state of the law in various circuits.

Through *Butros*, the Ninth Circuit has offered yet another interpretation of perhaps the most ambiguous statutory provision in the INA. *See infra* notes 73-108 and accompanying text for the varying interpretations regarding (1) the commencement of an alien's lawful domicile for purposes of § 212(c) relief, (2) the termination of such lawful domicile, and (3) motions to reopen or reconsider the denial of § 212(c) relief.

15. Tying § 212(c) eligibility to an administratively final deportation order is a requirement absent in the language and legislative history of § 212(c). The requirement was created in *Gonzales* through a misunderstanding of a prior BIA case (Matter of Lok II). *See infra* notes 198-216 and accompanying text discussing the misunderstanding. This misunderstanding was compensated for rather than corrected in *Butros*. *See infra* notes 221-38 and accompanying text discussing the *Butros* court's approach in overruling *Gonzales*.

an LPR.¹⁶ He was six years old at the time.¹⁷ In 1987, he was convicted of a drug offense in Oregon.¹⁸ This conviction rendered Butros deportable under § 241(a)(11) of the INA.¹⁹ The Immigration and Naturalization Service ("INS") subsequently moved to deport him.²⁰ At the time, Butros' family resided in the United States.²¹ Butros conceded deportability but moved for relief under § 212(c) of the INA.²² In 1988, the immigration judge denied relief and entered a deportation order.²³

Butros immediately filed an appeal to the BIA.²⁴ The BIA summarily dismissed the appeal because Butros failed to specify the reasons for his appeal.²⁵

16. See *Butros v. INS*, 990 F.2d 1142, 1142-43 (9th Cir. 1993).

17. See *Id.* at 1142.

18. See *Butros*, 990 F.2d at 1143. In 1986, Butros was involved in a motorcycle accident which resulted in a broken arm, a broken jaw and the loss of four teeth. Petitioner's Brief at 4, *Butros* (No. 91-70372) (hereinafter, "P.B."). At least two treating physicians independently prescribed Percodan for the pain. *Id.* Percodan is known to cause dependency. After the prescriptions ceased, Butros began using cocaine, an illegal drug similar in nature and effect to Percodan. *Id.* Butros claimed to have sold cocaine solely to supply his lawfully acquired habit of taking Percodan. Respondent's Brief at 8, *Butros* (No. 91-70372) (hereinafter "R.B.").

19. Codified as 8 U.S.C. § 1251(a)(11) (1988) amended by 8 U.S.C. § 1251(a)(2)(B)(i) (Supp. II 1990).

20. See *Butros*, 990 F.2d at 1143.

21. His mother, father, and sister also resided in the United States as LPRs. R.B. at 5-6. His three brothers were naturalized citizens. *Id.*

22. See *supra* note 2 for the text of § 212(c). This provision has been extended to cover aliens who have not left the country. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); see *infra* notes 56-63 and accompanying text discussing the *Francis* court's rationale.

23. See *Butros*, 990 F.2d at 1143. The Immigration Judge was prepared to make a favorable ruling until the INS presented its case in rebuttal. *Id.* at 1147. Butros' non-disclosure of a subsequent arrest for selling cocaine was found to be representative of his lack of rehabilitation. *Id.* Furthermore, the Judge was distressed by the statement, "You didn't do anything before, why do you think you can do anything now?" which Butros had made to an official following the second arrest. *Id.*

24. See *Butros*, 990 F.2d at 1147. The BIA reviews administrative rulings of immigration judges. See 8 C.F.R. § 3.1(b) (1992).

25. See *Butros*, 990 F.2d at 1147. The BIA acted in accordance with 8 C.F.R. § 3.1(d)(1-a)(i) (allowing the BIA to summarily dismiss any appeal in any case when the alien fails to specify the reasons for appeal). Butros later accredited the omission to ineffective assistance of counsel. See *Butros*, 990 F.2d at 1143.

Following the BIA's dismissal Butros hired a new lawyer. *Id.* at 1147. The new counsel filed a complaint against prior counsel with the Oregon State Bar. See *Butros v. INS*, 804 F. Supp. 1336, 1338 (D. Or. 1991). The complaint alleged that prior counsel "failed to clarify a crucial error, failed to call favorable witnesses, failed to prepare petitioner adequately and failed to understand the law." *Id.*

Butros also applied to the district director for a stay of deportation which was denied shortly thereafter. *Butros*, 990 F.2d at 1143.

Butros then filed a "Motion to Reopen and Reconsider"²⁶ with the BIA.²⁷ He claimed ineffective assistance of counsel and offered new evidence.²⁸

The BIA refused to reopen or reconsider Butros' case because the deportation order "became administratively final at

26. See 8 C.F.R. § 3.2. The regulation provides:

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b)(1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

Id. (emphasis added).

27. See *Butros*, 990 F.2d at 1143.

28. *Id.*

Butros also asked the BIA for a stay of deportation. *Id.* Without the stay of deportation, Butros would have been physically deported from the United States before the BIA ruled on the motion to reopen and reconsider. Consequently, any motion to reopen or reconsider on Butros' behalf would have been considered withdrawn. See 8 C.F.R. § 3.2; see *supra* note 26 for the text of the regulation. The BIA denied the stay. See *Butros*, 990 F.2d at 1143.

Butros then filed a petition of habeas corpus in the United States District Court for the District of Oregon. *Id.* The District Court reversed the BIA's decision and granted the stay of deportation. *Id.* The District Court observed that Butros' claim was "not frivolous." *Id.* The denial of the stay effectively foreclosed "petitioner's right under 8 C.F.R. §§ 3.2, 3.8 to move to reopen this case." *Id.* The District Court concluded that the denial of the stay was an abuse of discretion. *Id.*

the time of [the summary dismissal of the initial appeal]."²⁹ The BIA reasoned that at the time of administrative finality, Butros was divested of his LPR status and, therefore, became statutorily ineligible for § 212(c) relief.³⁰ The Ninth Circuit Court of Appeals, sitting *en banc*, granted review.³¹

III. BACKGROUND

The primary issue in *Butros v. INS*³² was whether the BIA correctly denied Butros' "Motion to Reopen and Reconsider" based solely on its conclusion that he was statutorily ineligible for § 212(c) relief. Logically, the Ninth Circuit had to analyze whether Butros was statutorily eligible for § 212(c) relief in order to determine whether the BIA was correct in denying Butros' motion to reopen and reconsider.

Section 212(c), as written, applies only to aliens returning from a temporary departure who are in exclusion proceedings.³³ Case law has extended its application to aliens, such as Butros, who have not temporarily proceeded abroad and are the subjects of deportation proceedings.³⁴ Unfortunately, confusion has accompanied this extension as the various circuits have disagreed on the application of § 212(c) to deportation proceedings.³⁵

A. HISTORY OF § 212(c)

1. *The Exclusion-Deportation Distinction and the Need for Discretionary Relief*

Deportation applies to aliens³⁶ who have made an entry³⁷

29. See *Butros*, 990 F.2d at 1143.

30. *Id.* Implicitly, the BIA required an alien to maintain LPR status when applying for § 212(c) relief.

31. *Butros v. INS*, 977 F.2d 1358 (9th Cir. 1992).

32. 990 F.2d 1142 (9th Cir. 1993).

33. See *supra* note 2 for the text of the statute.

34. See *infra* notes 56-66 and accompanying text discussing the extension of § 212(c) relief to deportation proceedings.

35. See *infra* notes 73-108 and accompanying text discussing the various constructions of § 212(c).

36. The term "alien" describes any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3). The term "national" describes a person owing permanent allegiance to a state. *Id.* § 1101(a)(21).

into the United States, whereas exclusion applies to aliens attempting to enter the United States.³⁸ In general, the rules of exclusion are much stricter than the rules of deportation.³⁹ There were nineteen grounds of deportation⁴⁰ as compared to thirty-four grounds of exclusion⁴¹ prior to the Immigration Act of 1990.⁴² Therefore, aliens could commit excludable offenses yet

37. The term "entry" is defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise . . . [p]rovided, that no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception." 8 U.S.C. § 1101 (a)(13).

38. See *Landon v. Plasencia*, 459 U.S. 21, 25 (1982) ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.").

39. Compare 8 U.S.C. 1182(a) (1988) (the exclusion grounds) with 8 U.S.C. 1251(a) (1988) (the deportation grounds). The underlying rationale is that a person in the United States should be given every chance to stay, while an outsider should face heightened scrutiny before being allowed in.

40. These include, *inter alia*, aliens who were excludable at entry, entered without inspection, have become institutionalized at public expense, have been convicted of a crime involving moral turpitude, currently advocate anarchy or communism, have engaged or had purpose to engage in espionage, sabotage or activities subversive to the national interest, are drug addicts or have been convicted of a violation of any law relating to a controlled substance, or have been convicted of possessing illegal firearms, notably the sawed-off shotgun. 8 U.S.C. §§ 1251(a)(1), (2), (3), (4), (6), (7), (11) and (14) (1988).

41. These include, *inter alia*, aliens who are mentally retarded, are insane, are sexual deviants, mentally defective or have psychopathic personalities, are drug addicts or alcoholics, are afflicted with a dangerous contagious disease, have been convicted of a crime involving moral turpitude, have been convicted of two or more crimes involving actual sentences of at least five years in the aggregate, have been convicted of a crime relating to a controlled substance or are suspected of involvement with the trafficking of controlled substances, are likely to become public charges, have been previously deported, intentionally, negligently, or fraudulently failed to comply with documentary entry requirements, are or have been anarchists or communists, have assisted in the illegal entry of another alien into the United States, or are graduates of a foreign non-accredited medical school and who enter with the intention of practicing medicine. 8 U.S.C. §§ 1182(a)(1), (2), (4)-(6), (9), (10), (23), (15), (17), (19)-(21), (28), (31), and (32).

42. The Immigration Act of 1990 ("IA 90") completely reorganized the grounds for deportation. See Janet H. Cheetham, *Deportation Grounds Under the Immigration Act of 1990*, IMMIGRATION BRIEFINGS, NO. 91-11 November 1991. The nineteen distinct grounds were grouped into five categories: (1) Excludable at Time of Entry or of Adjustment of Status or Violates Status; (2) Criminal Offenses; (3) Failure to Register and Falsification of Documents; (4) Security and Related Grounds; and (5) Public Charge. 8 U.S.C. §§ 1251(a)(1)-(5) (Supp. IV 1992). Each category except the fifth is comprised of several grounds. A few of the old deportation grounds were abolished, including those which applied when an alien became institutionalized, involved with prostitution, was convicted of a violation of title I of the Alien Registration Act, 1940. 8 U.S.C. §§ 1251(a)(3), (12), (15), and (16) (1988). Several new deportation grounds were established, including those which apply when an alien is involved in terrorist activities, un-

not be deportable.⁴³

In such a scenario, so long as the alien remained within the United States, no action could be brought against him. Once the alien departs the country and attempts to re-enter, however, the grounds for exclusion would govern his admissibility. Since the alien had committed an excludable offense, the alien's re-entry would be barred.⁴⁴

The harshness of this anomaly can be illustrated by a hypothetical example of an LPR⁴⁵ who contracted a communicable disease⁴⁶ while in the United States and traveled abroad for

lawful technology or information transfer, money laundering, or when the Secretary of State has reasonable grounds to believe that the alien's presence or activities in the United States would have potentially serious adverse foreign policy consequences. 8 U.S.C. §§ 1251(a)(4)(B), (4)(A)(i), (2)(A)(iii), (4)(C) (Supp. IV 1992).

IA 90 completely reorganized the grounds of exclusion, as well. See Daniel Levy, *Exclusion Grounds Under the Immigration Act of 1990: Part I*, IMMIGRATION BRIEFINGS, NO. 91-8 August 1991; *Exclusion Grounds Under the Immigration Act of 1990: Part II*, IMMIGRATION BRIEFINGS, NO. 91-9 September 1991. There are currently nine categories of exclusion grounds: (1) health-related grounds; (2) crime-related grounds; (3) national security grounds; (4) public charge; (5) labor protection grounds; (6) prior immigration violations; (7) documentation requirements; (8) grounds relating to military service in the United States; and (9) miscellaneous grounds. 8 U.S.C. §§ 1182(a)(1)-(9) (Supp. IV 1992). Each category except the fourth is comprised of several grounds. IA 90 abolished the exclusion grounds based upon mental retardation; physical defects which might impede the aliens ability to earn a living; paupers, professional beggars, or vagrants; immoral sexual activity; and illiterate aliens over the age of 16. 8 U.S.C. §§ 1182(a)(1), (7), (8), (13) and (25) (1988). IA 90 added, *inter alia*, the exclusion grounds for drug abusers; export control violators; terrorists or PLO members; admissions which would pose serious foreign policy risks; participants in genocide; and international child abductors. 8 U.S.C. §§ 1182(a)(1)(A)(iii), (3)(A)(i), (3)(B), (3)(C), (3)(E)(ii) and (9)(C) (Supp. IV 1992).

43. Interestingly, the grounds for exclusion and deportation overlap with respect to criminal offenses, public charges, documentary grounds and security reasons. However, there are distinct grounds for exclusion with respect to, *inter alia*, health-related and labor protection areas. 8 U.S.C. §§ 1182(a)(1) and (5) (Supp. IV 1992).

44. A judicially-created exception, known as the *Fleuti* Doctrine, does apply if the departure was "innocent, casual, and brief." *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963); see *Landon*, 459 U.S. at 28-29; *Git Foo Wong v. INS*, 358 F.2d 151, 153 (9th Cir. 1966). In *Fleuti*, the alien, who was homosexual, went to Ensenada, Mexico for "about a couple of hours." *Fleuti*, 374 U.S. at 450. Homosexuality was not a deportable offense but was an excludable offense. 8 U.S.C. § 1182(a)(4) (1988). The INS sought to later deport Fleuti as excludable at time of entry. *Fleuti*, 374 U.S. at 450-51. The court sympathized with Fleuti and did not classify his admission back into the U.S. as an "entry" within the definition of 8 U.S.C. § 1101(a)(13). *Fleuti*, 374 U.S. at 461-63.

45. An LPR falls within the definition of "alien." See 8 U.S.C. § 1101(a)(3).

46. Carrying a communicable disease is an excludable offense. 8 U.S.C. § 1182(a)(6). However, it is not a deportable offense.

treatment. Though he would not be deported while he remained in the country, following his departure he would be denied re-entry based on his status as an excludable alien. Congress initially attempted to alleviate this problem through the "seventh proviso" of the Immigration Act of 1917,⁴⁷ and, subsequently, through § 212(c) of the INA.⁴⁸

2. *The Seventh Proviso: Statutory Precursor to Section 212(c)*

Prior to 1952, the "seventh proviso" of the Immigration Act of 1917⁴⁹ afforded relief to aliens in a predicament such as that of the hypothetical excludable alien.⁵⁰ It provided that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor and under such conditions as he may prescribe."⁵¹ An alien who had maintained the required seven-year domicile could thereby be allowed to seek a waiver from exclusion. Thus, in the above example of the alien with the communicable disease, so long as he had been domiciled in the United States for seven consecutive years prior to his brief departure, he could qualify for discretionary admission.

The seventh proviso was criticized, however, because it did not require the original entry to be lawfully made,⁵² nor did it

47. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875 (repealed 1952).

48. It is interesting to note that because the rationale behind enacting § 212(c) was to offer relief from excludable offenses, the statute was not designed to afford relief to aliens, such as Butros, in deportation proceedings.

49. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875 (repealed 1952).

50. See *supra* notes 45-46 and accompanying text presenting the hypothetical.

51. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875 (repealed 1952).

52. See S. REP. NO. 1515, 81st Cong., 2d Sess. 66 (1950). The report contained the following language,

It appears that when the seventh proviso was made a part of the 1917 act the proviso was intended to give discretionary power to the proper government official to grant relief to aliens who were reentering the United States after a temporary absence, who came in the front door, were inspected, lawfully admitted, established homes here and remained for 7 years before they got into trouble.

Id. at 382. The report also stated that "[t]he subcommittee recommends that the proviso would be limited to aliens who have the status of lawful permanent residents who are returning to a lawful domicile of seven consecutive years after a temporary absence abroad." *Id.* at 384.

preclude nonimmigrants⁵³ from qualifying.⁵⁴ Congress addressed this criticism by incorporating a requirement that the alien have been "lawfully admitted for permanent residence." In 1952, this modified version of the seventh proviso was enacted as § 212(c) of the INA.⁵⁵

3. *The Expansion of Section 212(c) to Afford Relief From Deportation*

At its inception, § 212(c) relief was invoked only when an excludable alien physically departed the country and later returned.⁵⁶ In 1976, the Second Circuit's landmark decision in *Francis v. INS*⁵⁷ vastly expanded the scope of § 212(c). In *Francis*, the alien did not depart the United States following his conviction of a marijuana offense.⁵⁸ The INS charged him with being deportable under § 241(a)(11).⁵⁹ Francis satisfied all § 212(c) requirements but for his absence to depart the country.⁶⁰

The Second Circuit, applying the minimum scrutiny test,⁶¹

53. The nonimmigrant classes are listed in the INA. They include, *inter alia*, ambassadors, their staff and family, business visitors and tourists, students, and foreign media along with their spouses and children. 8 U.S.C. §§ 1101(a)(15)(A), (B), (F) and (I).

54. See S. REP. No. 1137, 82d Cong., 2d Sess. 13 (1952).

55. See *supra* note 2 for the text of § 212(c).

56. In 1956, it was extended to aliens who had already reentered, under the rationale that aliens who, if requested, could have asserted 212(c) at the time of reentry, should not be precluded from doing so simply because the excludable offense escaped detection until after admission. See *Matter of G.A.*, 7 I. & N. Dec. 274, 276 (1956) (relying in part upon *Matter of L.*, 1 I. & N. Dec. 1 (1940)). In *Matter of L.*, the Attorney General accorded seventh proviso relief *nunc pro tunc* to an alien in deportation proceedings because the alien had departed the United States in the past and would have qualified at the time of last entry had he been excluded for his offense. *Matter of L.*, 1 I. & N. Dec. at 6.

57. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

58. *Francis*, 532 F.2d at 269.

59. *Id.* This ground of deportation parallels the ground of exclusion for possession of narcotic drugs. 8 U.S.C. § 1182(a)(23).

60. See *Francis*, 532 F.2d at 272. Had Francis departed the United States and sought re-entry, he would have been able to seek a waiver of the exclusion charge under § 212(c).

61. This is an equal protection test under which "distinctions between different classes of persons 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.* at 272 (citing *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

failed to discern a distinction between the class of aliens who had departed the United States following their deportable offense and the class of aliens who failed to depart.⁶² The requirement that aliens be "returning after a temporary absence" was therefore eliminated as violative of the equal protection guarantee of the Fifth Amendment.⁶³ The BIA voluntarily adopted the *Francis* rule.⁶⁴ The Ninth Circuit, although initially reluctant,⁶⁵ eventually followed the *Francis* rule.⁶⁶

B. APPLICATION OF SECTION 212(c) IN DEPORTATION CASES

As originally drafted, § 212(c) relief would not have been available to the alien in *Butros v. INS*.⁶⁷ Section 212(c) explicitly requires the alien to: first, be lawfully admitted for permanent residence;⁶⁸ second, have temporarily proceeded abroad voluntarily and not under an order of deportation;⁶⁹ and third,

62. *Francis*, 532 F.2d at 272, 273 ("Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time.").

63. *Id.* at 272-73. Courts have limited § 212(c) to only those grounds of deportation under 8 U.S.C. § 1251(a) which paralleled enumerated grounds of exclusion under 8 U.S.C. § 1182(a). See *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988).

64. See *Matter of Silva*, 16 I. & N. Dec. 26, 29-30 (1976); *Matter of Hom*, 16 I. & N. Dec. 112, 113-14 (1977); *Matter of Marin*, 16 I. & N. Dec. 581, 582 (1978).

65. Prior to *Francis*, the Ninth Circuit had addressed § 212(c) and concluded that the alien must depart and re-enter the United States to qualify for the discretionary relief. *Arias-Urbe v. INS*, 466 F.2d 1198, 1199-200 (9th Cir. 1972). Following *Francis*, the Ninth Circuit continued to require physical departure without addressing the conflict between the two doctrines. See *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979); *Bowe v. INS*, 597 F.2d 1158 (9th Cir. 1979); see generally, Bill Ong Hing, *The Ninth Circuit: No Place for Drug Offenders*, 10 GOLDEN GATE L. REV. 1 (1980) (advocating the *Francis* approach in the Ninth Circuit).

66. See *Tapia-Acuna v. INS*, 640 F.2d 223, 224-25, (9th Cir. 1981) (observing the Second Circuit's implicit extension of § 212(c) to only those grounds of deportation which would render the alien excludable). In cases where an alien's actions constitute grounds for deportation, but not exclusion, the Ninth Circuit has denied § 212(c) relief. See *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988) (alien convicted of carrying a sawed-off shotgun, hence deportable under § 241(a)(14), denied § 212(c) relief as the conviction would not render the alien excludable). The rationale for this distinction stems from judicial interpretation of Congressional intent that "[§ 212(c)] relief applies only to [§ 212], the exclusion statute." *Cabasug*, 847 F.2d at 1326.

67. 990 F.2d 1142 (9th Cir. 1993).

68. "Lawfully admitted for permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(20) (1988).

69. This requirement has been abrogated by case law. See *supra* notes 56-66 and

be returning to a lawful unrelinquished domicile of seven consecutive years.⁷⁰ As the statute was extended to cover aliens in deportation proceedings, administrative and judicial construction of § 212(c) diverged on such issues as when the alien's lawful domicile commences and terminates.⁷¹ Courts also divided as to whether the termination of lawful domicile renders the alien ineligible to move to reopen or reconsider the denial of § 212(c) relief.⁷²

1. *Terminating Lawful Domicile Under Section 212(c)*

At issue in *Butros v. INS*⁷³ was the termination of lawful domicile.⁷⁴ The BIA and the various circuits have adopted dif-

accompanying text discussing its abolition.

70. See *supra* note 2 for the text of § 212(c). Technically, § 212(c) does not require a showing of rehabilitation or extreme hardship. However, since relief is discretionary, an immigration judge may evaluate both factors before rendering a decision. See *Matter of Marin*, 16 I. & N. Dec. 581 (1978). An immigration judge may also require a showing of good moral character. See *Matter of N.*, 7 I. & N. Dec. 368 (1956).

71. See *infra* notes 73-90 and accompanying text discussing the different views with respect to termination of lawful domicile.

72. See *infra* notes 91-108 and accompanying text discussing the different views with respect to motions to reopen or reconsider the denial of § 212(c) relief.

73. 990 F.2d 1142 (9th Cir. 1993).

74. *Id.* at 1144-46. The Ninth Circuit had to decide whether the administratively final deportation order terminated Butros' LPR status and, concurrently, his lawful domicile, because the Ninth Circuit had required present LPR status as a prerequisite to § 212(c) eligibility. *Id.*; see *Gonzales v. INS*, 921 F.2d 236, 238 (9th Cir. 1990).

Although the *commencement* of lawful domicile was not at issue in *Butros v. INS*, variations in its interpretation reflect the confusion caused by judicial extension of § 212(c) to deportation proceedings. Determining when lawful domicile commences hinges upon whether the clause "lawfully admitted for permanent residence" is read to modify the clause "lawful unrelinquished domicile of seven consecutive years" or is read independently from it. See *supra* note 2 for the text of § 212(c).

The BIA and various circuits do not consistently interpret the statutory language in determining when lawful domicile commences. See, e.g. *Matter of Lok*, 15 I. & N. Dec. 720 (1976) (mandating that an alien establish the seven-year lawful unrelinquished domicile *after* having been lawfully admitted for permanent residence, thereby nullifying the accrual of time toward the 7-year requirement that an alien lawfully spent in the United States prior to obtaining LPR status); *Lok v. INS*, 548 F.2d 37, 41 (2d Cir. 1977) (overruling the BIA's interpretation in *Matter of Lok* and opting instead to further "the obvious purpose of the statute [which was] to mitigate the hardship that deportation poses for those with family ties in this country" by counting the time an alien resides in the United States, *prior* to obtaining LPR status, toward the seven-year requirement so long as the alien has legally resided in the country); *Castillo-Felix v. INS*, 601 F.2d 459, 465 (9th Cir. 1979) (disagreeing with the Second Circuit's conclusion that the BIA's interpretation of § 212(c) was inconsistent with congressional policy as well as its statutory intent, and recognizing that because it was called upon to interpret "an ambiguous provision with little legislative history to clarify how Congress intended it to be applied," it

ferent approaches in determining when lawful domicile terminates.⁷⁵ The BIA, in *Matter of Lok*,⁷⁶ (hereinafter "*Matter of Lok II*")⁷⁷ ruled that once an alien is found deportable with administrative finality, that alien can no longer be considered "lawfully admitted for permanent residence."⁷⁸ The BIA consid-

was appropriate to defer to the administrative agency in charge); *Chiravacharadhikul v. INS*, 645 F.2d 248, 250 (4th Cir. 1981) (following the 9th Circuit's approach in deferring to the BIA); *Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979) (adopting a two-part test for determining when lawful domicile begins: 1- focusing on whether the alien intended to permanently remain in the United States; and 2- analyzing whether such an intent was legal under U.S. laws).

75. Recall, *Butros* overruled *Gonzales* on the issue of when lawful domicile for purposes of § 212(c) terminates. *Butros*, 990 F.2d at 1145.

76. 18 I. & N. Dec. 101 (1981).

77. Tim Lok's ordeal through the administrative and judicial court systems resulted in two notable BIA decisions and two notable Second Circuit decisions. *Matter of Lok*, 15 I. & N. Dec. 720 (1976) [hereinafter "*Matter of Lok I*"]; *Lok v. INS*, 548 F.2d 37 (2d Cir. 1977) [hereinafter "*Tim Lok I*"]; *Matter of Lok II*, 18 I. & N. Dec. 101 (1981); *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982) [hereinafter "*Tim Lok II*"].

78. *Matter of Lok II*, 18 I. & N. Dec. at 105.

That deportation changes an alien's status to one not "lawfully admitted for permanent residence" is not supported by statutory language nor any legislative history. The legislative history is silent as to which changes in status remove the alien from this classification. Any analysis of § 212(c)'s legislative history, for purposes of deportation proceedings, should be strictly scrutinized because this statute was designed to accord relief in exclusion proceedings. Administrative and case law have extended its application to deportation. See *supra* notes 56-66 and accompanying text discussing the extension.

In *Matter of S.*, 6 I. & N. Dec. 392 (1954), approved by Attorney General, 6 I. & N. Dec. at 397 (1955), the BIA examined the legislative purpose of § 212(c) and its precursor, the seventh proviso. The BIA reasoned that the inclusion of the "lawfully admitted for permanent residence" requirement was geared toward a concern for *nonimmigrants* qualifying for discretionary relief. *Id.* at 396-97; see *supra* note 68 for the definition of "lawfully admitted for permanent residence." The BIA recognized that "language can have different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Id.* at 396. The BIA concluded:

There is specific provision in section 247 whereby certain resident aliens may have their status adjusted to nonimmigrant status. And it is logical to assume that the Congress, having expressed a serious disapproval of the practice whereby 7th Proviso relief was accorded to aliens who had been admitted to the United States in a nonimmigrant status, wished to make it clear that not only was this type of relief not to be granted to aliens unless lawfully admitted as immigrants, but to emphasize that it was also *not to be granted to aliens who thereafter changed their status from that of immigrants to nonimmigrants*. It is our conclusion that in order to give effect to the overall legislative design, this is the meaning which must be given to the term "such status not having changed."

Id. at 396-97 (quoting 8 U.S.C. § 1101(a)(20)) (emphasis added). The Ninth Circuit, as well as the United States Supreme Court, have affirmed this interpretation of the stat-

ered four stages within the deportation process at which point the alien could be deemed to have lost the determinative status:

- (1) upon the immigration judge's initial determination of deportability, (2) when the immigration judge's order becomes administratively final, (3) when a United States Court of Appeals acts upon a petition for review of the Board's order or the time allowed for filing such petition expires, or (4) only upon the execution of the deportation order by the alien's departure, voluntary or enforced, from this country.⁷⁹

The BIA opted to terminate the alien's lawful domicile at the second stage—upon administrative finality of the deportation order, i.e., when the BIA affirms the immigration judge's decision.⁸⁰

The Fifth and Seventh Circuits have concurred with the BIA's approach.⁸¹ The Second Circuit generally agrees with the

ute. *Gooch v. Clark*, 433 F.2d 74, 79 (1970) ("[The phrase 'such status not having changed'] refers primarily to aliens who have changed their status from immigrants to nonimmigrants."); *Saxby v. Bustos*, 419 U.S. 65, 72 (1974) ("[T]he change in status which Congress had in mind was a change from an immigrant lawfully admitted for permanent residence to the status of a nonimmigrant pursuant to 8 U.S.C. § 1257.").

Nevertheless, necessity and common sense justify the BIA's interpretation. The opposite conclusion would be undesirable and contradictory—an alien, pronounced deportable with administrative finality, would qualify as an LPR.

79. *Matter of Lok II*, 18 I. & N. Dec. at 105.

80. *Id.*

The BIA decided against the first stage, thereby preserving an alien's right to appeal an immigration judge's finding of deportability. *Id.* at 106. See 8 C.F.R. § 3.1(b)(2) (1992); 8 C.F.R. § 242.21 (1992).

The fourth stage was disfavored as it could lead to "incongruous results." *Matter of Lok II*, 18 I. & N. Dec. at 106. The BIA, in hypothesizing such a result, postulated that "a clearly deportable alien who has exhausted all of his administrative and judicial appeal rights but whose departure cannot for some reason be enforced (e.g., for a lack of a country that will accept him into its territory) may continue to accord designated relatives visa preference so long as he remains in this country." *Id.*

The third stage was also rejected. The BIA reasoned that, unlike a United States Court of Appeals which is limited to reviewing errors of law and unfairness in procedure, the BIA has plenary power to review an appeal *de novo*. *Id.* at 106-07. Moreover, the BIA believed that extending lawful status to an alien under an administratively final deportation order, pending judicial review, would encourage spurious appeals to the courts. *Id.* at 107. In the BIA's opinion, such an inconvenience would far outweigh the "relatively rare instances where the court determines that the Board erred." *Id.*

81. *Rivera v. INS*, 810 F.2d 540, 542 (5th Cir. 1987), *reh'g denied en banc*, 816 F.2d 677 (5th Cir. 1987); *Variamparambil v. INS*, 831 F.2d 1362, 1366 (7th Cir. 1987).

BIA but has terminated lawful domicile at the first stage—upon a deportability finding by an immigration judge—in the event the alien fails to challenge the deportation order on the merits.⁸²

The Eleventh Circuit, in *Marti-Xiques v. INS*,⁸³ employed a simple, yet extremely harsh, interpretation in determining when lawful domicile terminates. The *Marti-Xiques* court sought to avoid “the problem of tying the accrual of § 212(c)’s seven-year period to the quirks and delays of the administrative and judicial processes.”⁸⁴ Its solution was to set the cutoff date at the time “the INS commences the deportation proceedings, i.e. when the order to show cause is issued.”⁸⁵

The Ninth Circuit divides aliens into two different categories in determining when their lawful domicile terminates. Aliens who challenged deportation orders on the merits would not lose their lawful domicile while their case was on appeal to the Ninth Circuit⁸⁶ (the BIA’s third stage), so long as the challenge was not frivolous.⁸⁷

82. *Tim Lok II*, 681 F.2d 107, 110 (2d Cir. 1982). The court stressed that an immigration judge’s finding of deportability must be challenged on the merits in order to prevent lawful domicile from terminating. *Id.* An appeal to the BIA based solely on denial of § 212(c) relief would not be considered “on the merits” and, therefore, lawful domicile would terminate. *See id.*

83. *Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir. 1984).

84. *Id.* at 355.

85. *Id.* Although this is not one of the four stages considered by the BIA, at least one commentator approves of it because:

The hardship imposed by such a rule is outweighed by its benefits; it is easily applied and treats all aliens facing deportation equally; it decreases the probability of meritless appeals; and it would promote the congressional goal of removing from the immigration laws procedural devices that permit aliens to extend their stay in the United States without justification.

Matthew A. Reiber, *Section 212(c) of the Immigration and Nationality Act in the Federal Courts*, 24 COLUM. J. TRANSNAT’L L., 623, 646 (1986).

86. *Wall v. INS*, 722 F.2d 1442 (9th Cir. 1984). The *Wall* court distinguished itself from *Tim Lok II* and *Marti-Xiques* because there the aliens had conceded deportability. *Id.* at 1444. The court reasoned that because “Wall had challenged the Board’s deportability decision on petition to this court for review, his continued presence in the United States after the administrative adjudication of deportability was a matter of law, not grace.” *Id.* Accordingly, Wall was allowed to accrue time on appeal toward the seven-year requirement.

87. Where the deportability challenge was on the merits but frivolous, the Ninth Circuit has deemed that the time on appeal to the circuit court would not be allowed. *See Torres-Hernandez v. INS*, 812 F.2d 1262 (9th Cir. 1987).

For aliens who conceded deportability but challenged the denial of § 212(c) relief, the Ninth Circuit, in *Gonzales v. INS*,⁸⁸ ruled that the alien's lawful domicile would be considered terminated at the time of administrative finality (the BIA's second stage).⁸⁹ Thus, the Ninth Circuit's view prior to *Butros v. INS*,⁹⁰ in relation to aliens who had conceded deportability but were challenging the denial of § 212(c) relief, was identical to that of the Second, Fifth, and Seventh Circuits in that they all terminated lawful domicile at the time of an administratively final deportation order.

2. *Motions to Reopen or Reconsider the Denial of Section 212(c) Relief*

If and when § 212(c) relief is denied, the alien may move to reopen or reconsider the decision.⁹¹ The BIA must deny the motion if the alien is *prima facie* ineligible; if there is an absence of previously unattainable, material evidence; or if § 212(c) relief would have to be denied in the exercise of discretion.⁹² Even if the motion could be entertained, the alien still bears the heavy burden of proving that the new evidence would likely change the outcome of the case.⁹³

*Butros v. INS*⁹⁴ concerned the BIA's denial of Butros' "Motion to Reopen and Reconsider" on the ground that Butros was *prima facie* ineligible for § 212(c) relief.⁹⁵ The Ninth Circuit requires that an alien possess LPR status when moving to reopen in order to preserve *prima facie* eligibility.⁹⁶ Aliens subject to a

88. 921 F.2d 236 (9th Cir. 1990).

89. *Id.* at 240. This rule is identical to the BIA's view in *Matter of Lok II*. See *Matter of Lok II*, 18 I. & N. Dec. at 105.

90. 990 F.2d 1142 (9th Cir. 1993).

91. 8 C.F.R. § 3.2; see *supra* note 26 for the text of the regulation.

92. *Matter of Coelho*, Int. Dec. 3172 (BIA, Apr 30, 1992) (citing *INS v. Doherty*, 112 S. Ct. 719, 725 (1992)).

93. *Id.*

94. 990 F.2d 1142 (9th Cir. 1993).

95. See *id.* at 1144-46.

96. *Gonzales v. INS*, 921 F.2d 236, 238 (9th Cir. 1990) ("Eligibility for a discretionary waiver under Section 212(c) thus requires the petitioner (1) be *presently* a lawful permanent resident of the United States and (2) have a lawful unrelinquished domicile for seven consecutive years.").

Butros overruled *Gonzales* to the extent that lawful domicile for § 212(c) purposes would not terminate upon an administratively final deportation order but when the BIA

final order of deportation lose their LPR status.⁹⁷ Such aliens in the Ninth Circuit, then, become statutorily ineligible for § 212(c) relief and cannot apply for, nor move to reopen or reconsider the denial of, such relief.⁹⁸

The Ninth Circuit articulated the rationale behind this approach in *Gonzales*.⁹⁹ The *Gonzales* court reasoned

if section 212(c) were available to persons after an order of deportation is made final, then such applications would never end. An alien who was a lawful permanent resident for seven years and is then deported would, if *Gonzales's* [sic] argument is adopted, be eligible for 212(c) waiver indefinitely, even after being deported.¹⁰⁰

Thus, in the Ninth Circuit, an alien loses § 212(c) eligibility when the alien's LPR status, and concurrently the alien's lawful domicile, terminates.¹⁰¹

The Second Circuit, in *Vargas v. INS*,¹⁰² criticized the *Gonzales* decision for improperly denying a motion to reopen simply because the alien's lawful domicile had ended.¹⁰³ The *Vargas* court stated, "we do not accept the view that a final order of deportation also bars an alien from requesting reopening of a properly filed Section 212(c) request. Such a motion requests no new relief, but simply asks the BIA to reevaluate a prior action."¹⁰⁴ Although not expressly stated, the *Vargas* court implied that LPR status terminates upon an administratively final de-

could no longer reopen or reconsider the case. *Butros*, 990 F.2d at 1145. In so doing, *Butros* passively affirmed the *Gonzales* requirement that present LPR status is required for § 212(c) eligibility. See *id.*

97. See *Gonzales*, 921 F.2d at 238; *Matter of Lok II*, 18 I. & N. Dec. 101, 105 (1981).

98. See *Gonzales*, 921 F.2d 236, 239 (9th Cir. 1990) ("The question is whether [the alien] was eligible under the statute at the time of her motion to reopen.").

99. In *Gonzales*, the alien had satisfied the seven-year requirement long before deportation proceedings commenced. *Gonzales*, 921 F.2d at 239. Nevertheless, she was found statutorily ineligible for § 212(c) relief because she did not possess a lawful domicile at the time she requested relief. *Id.* at 239-40. Her lawful domicile was deemed to have terminated when the immigration judge's order of deportation was affirmed by the BIA. *Id.* Thus, her motion to reopen was denied as she was *prima facie* ineligible.

100. *Id.* at 240. But see *infra* notes 124-25 and accompanying text describing the *Butros* court's revelation of the flaw in the *Gonzales* court's reasoning.

101. See *Butros*, 990 F.2d 1142; *Gonzales*, 921 F.2d 236.

102. 938 F.2d 358 (2d Cir. 1991).

103. See *Vargas*, 938 F.2d at 363.

104. *Id.*

portation order but that the alien need not possess present LPR status to apply for § 212(c) relief or to move to reopen the denial of such relief. The Second Circuit's concern obviously centered on the present LPR status requirement.

The Ninth Circuit focused instead on the deportation order's finality, the point at which LPR status terminates. Prior to *Butros*, the LPR status of an alien who had conceded deportability terminated upon an administratively final deportation order.¹⁰⁶ Accordingly, an alien's motion to reopen or reconsider would have to be denied as the alien would have lost *prima facie* eligibility.¹⁰⁶ Following *Butros*, the LPR status of such an alien terminates when the alien has physically departed the United States.¹⁰⁷ Accordingly, an alien's motion to reopen or reconsider would have to be considered so long as the alien did not leave the country.¹⁰⁸

IV. THE COURT'S ANALYSIS

In *Butros v. INS*,¹⁰⁹ the Ninth Circuit had to decide whether the BIA was correct in denying Butros' "Motion to Reopen and Reconsider" for the sole reason that Butros was under an administratively final deportation order.¹¹⁰ The Ninth Circuit had previously affirmed the denial of similar motions under the belief that present LPR status is required to maintain eligibility for § 212(c) relief and that an administratively final deportation order terminates the alien's LPR status.¹¹¹ The *Butros* court proceeded to review the rationale behind the existing rules.

A. THE MAJORITY¹¹²

Butros' claim hinged on whether the administratively final deportation order terminated his LPR status and, concurrently,

105. *Gonzales*, 921 F.2d at 238.

106. *Id.*

107. *See Butros*, 990 F.2d at 1145; 8 C.F.R. § 3.2.

108. *See* 8 C.F.R. § 3.2; *see supra* note 26 for the text of the regulation.

109. 990 F.2d 1142 (9th Cir. 1993).

110. *Id.* at 1144-46.

111. *See Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990).

112. *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (per Noonan, J.).

the lawfulness of his domicile.¹¹³ In the court's opinion, this determination depended on the interpretation of the statutory language "such status not having changed."¹¹⁴ The court viewed this as a purely legal question and proceeded to review the BIA's decision *de novo*.¹¹⁵

The court examined the BIA's regulations on motions to reconsider or to reopen.¹¹⁶ These regulations did not restrict the alien's right to move to reconsider or to reopen by any reference to administrative finality.¹¹⁷ The court observed that the BIA could reopen or reconsider the case on its own motion after the point of administrative finality, so long as the alien had not physically departed the country.¹¹⁸ The court believed the BIA's position to be contradictory in that administrative finality restricted only the alien's right and not the BIA's right to reopen or reconsider the case.¹¹⁹

The court then analyzed the legal precedent for the BIA's decision. Specifically, the court examined the reasoning in *Matter of Lok II*¹²⁰ and *Gonzales v. INS*.¹²¹ The court recognized the policy concerns addressed in *Matter of Lok II*, including the danger of spurious appeals and "inherently incongruous"

113. The majority implicitly affirmed *Gonzales*' requirement that an alien must possess LPR status at the time § 212(c) relief is sought. See *Butros*, 990 F.2d at 1144-46; *Gonzales v. INS*, 921 F.2d 236, 238 (9th Cir. 1990); see *supra* notes 96-101 and accompanying text for a discussion of the *Gonzales* requirement.

114. *Id.* at 1144 (citing 8 U.S.C. § 1101(a)(20) (1988)).

115. *Butros*, 990 F.2d at 1144 (citing *Abedini v. INS*, 971 F.2d 188, 190-91 (9th Cir. 1992) ("We review *de novo* the Board's determination of purely legal questions regarding the requirements of the Immigration and Nationality Act.")).

116. *Butros*, 990 F.2d at 1144; see 8 C.F.R. § 3.2; see *supra* note 26 for the text of the regulation.

117. *Butros*, 990 F.2d at 1144.

118. *Id.* (citing 8 C.F.R. § 3.2).

119. *Id.* The court observed:

If the Board's original decision were final as to the status of the petitioner for discretionary relief, then of course there would be no such thing as reconsideration or reopening for the petitioner who lost on the first round. But to say, as the Board's regulations do say, that you may have a second round and at the same time to say, as the Board says here, you may not have a second round, is to engage in contradiction.

Id.

120. 18 I. & N. Dec. 101 (1981).

121. 921 F.2d 236 (9th Cir. 1990).

results.¹²² The court then observed that the Second Circuit had restricted *Matter of Lok II* to the class of aliens who had satisfied the seven-year requirement when they got into trouble with the law because the policy concerns were not as prevalent with respect to this class of aliens.¹²³

The court went on to address the concern raised in *Gonzales* that physically departed aliens would be eligible for § 212(c) relief absent a bar based on administrative finality.¹²⁴ The court recognized that the BIA's own regulation effectively met this concern by prohibiting the reopening or reconsidering of any case "subsequent to [the alien's] departure from the United States."¹²⁵

Butros overruled *Gonzales*.¹²⁶ The *Butros* court perceived *Gonzales*' fallacy to be "the belief that what is final for certain administrative purposes is final for all purposes."¹²⁷ The *Butros* court noted the BIA's recognition that "when appellate review exists, what looks like a final status can well turn out not to be a final status."¹²⁸ The court also gave considerable weight to the BIA's ability to reopen or reconsider cases on its own motion.¹²⁹ The court then stated that "[s]ince the Board's own practice, as well as its own regulation, establishes that for purposes of another look by the Board the status is not final, there can be no pretense of anything so simple as one all-embracing notion of

122. *Butros*, 990 F.2d 1145. The court cited as an example of an inherently incongruous result, a deportable alien "having the right to accord a designated relative a visa preference so long as the alien remained in this country." *Id.*

123. *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991). Recall, the Ninth Circuit, in *Gonzales*, extended *Matter of Lok II*'s reasoning to situations where the seven-year requirement was a moot issue. *Gonzales*, 921 F.2d at 238. See *supra* notes 76-80 and accompanying text discussing *Matter of Lok II*'s reasoning. Thus, an administratively final deportation order was deemed to terminate any alien's LPR status and, more importantly, their eligibility for § 212(c) relief. See *Gonzales*, 921 F.2d at 238. The *Gonzales* court expressed concern that extending § 212(c) relief beyond an administratively final decision would result in all aliens, including those already deported, being able to qualify. *Id.* at 240.

124. *Id.* This concern led the *Gonzales* court to extend *Matter of Lok II*'s reasoning to cases where the alien had already satisfied the seven-year requirement.

125. *Id.* at 1146 (citing 8 C.F.R. § 3.2).

126. *Id.* at 1145. See *infra* notes 221-60 and accompanying text discussing the ramifications of the Ninth Circuit's reversal.

127. *Butros*, 990 F.2d at 1145 ("[W]hen appellate review exists, what looks like a final status can well turn out not to be a final status.").

128. *Id.* (citing *Matter of Lok II*, 18 I. & N. Dec. 101, 107).

129. *Id.* (citing 8 C.F.R. § 3.2).

finality.”¹³⁰ Because no decision would ever be truly final, the *Gonzales* rule, which terminated eligibility for § 212(c) relief at the time of administrative finality, would be devoid of meaning. The *Butros* court then ruled that “so long as the Board may reconsider or reopen the case, the status of the petitioner in that case for purposes of § 212(c) relief has not been finally determined for purposes of action by the Board.”¹³¹

B. THE CONCURRENCE¹³²

Judge Fernandez characterized the issue as being straightforward.¹³³ The regulations allowed for the reopening of any decision, at any time, unless the alien had departed the country.¹³⁴ Because the regulations did not require the alien to maintain LPR status in order to reopen, Judge Fernandez saw no reason not to grant the motion to reopen.¹³⁵

He apparently believed that administrative finality did not

130. *Id.*

131. *Id.* The court also stated that “the Board erred in determining that the statutory language on change of status applies to an alien whose case may be *appealed*, reconsidered, or reopened.” Viewed under the BIA’s four stages upon which lawful domicile could terminate, the Ninth Circuit’s ruling seemingly extended the time of termination from the second stage (administrative finality) to the third stage (appeal) and to the fourth stage (physical departure). See *supra* note 79 and accompanying text listing the four stages first announced in *Matter of Lok II*, 18 I. & N. Dec. at 105.

In reaching its conclusion, the court stressed that it did not determine whether Butros’ motions to reopen or to reconsider should have been granted. *Butros*, 990 F.2d at 1146. The court further limited its ruling by stating that:

We are not deciding when an alien ceases to accumulate credit toward seven years of lawful permanent residence. By the same token we are not deciding the status of an alien subject to a deportation order for purposes of giving visa priority to a relative.

Id. Rather, the case was remanded for the BIA to determine the merits of Butros’ arguments to reopen or reconsider. *Id.*

132. *Butros v. INS*, 990 F.2d 1142, 1146 (Fernandez, J. concurring, joined by Beezer, J. and Hall, J.).

133. See *id.* (“[T]he issue is a simple procedural one; it is a question of whether a determination of the BIA can be reopened and reconsidered at any time, regardless of the type of issue involved. As I see it the majority says, ‘yes.’ I do not see that as a radical or shocking answer, so I agree.”).

134. 8 C.F.R. § 3.2; see *supra* note 26 for text of the regulation.

135. See *id.* Judge Fernandez apparently interpreted § 212(c) not to require that an alien be a lawful permanent resident at the time relief is sought. Since the regulations did not expressly bar the motion, Butros would be considered statutorily eligible. For this reason, Judge Fernandez favored granting Butros’ request.

preclude an alien from *reopening* a case. Instead, he viewed finality as “a somewhat fluid concept in law, as it is in nature—at least until the entropy of the universe.”¹³⁶ Judge Fernandez recognized that Rule 60(b) of the Federal Rules of Civil Procedure allows district court decisions to be reviewed and upset long after becoming final.¹³⁷ He further observed that criminal decisions can be overturned in habeas corpus proceedings long after being declared final.¹³⁸

In light of his analysis, Judge Fernandez saw no reason to consider cases and arguments regarding the “species of finality” for purposes of appealing to the Ninth Circuit.¹³⁹ Furthermore, Judge Fernandez declined to consider cases and arguments regarding the accrual of time toward the seven-year requirement during the appeals process.¹⁴⁰ Judge Fernandez reasoned that:

Those cases deal with precisely the same words in the statutory provision that we deal with here. Although it might be exceedingly difficult to say that those words could have different meanings for our purpose . . . we need not discuss the issue. All we need to do is hold the BIA to the regulations the INS has adopted. If the INS now wishes to adopt different regulations, that route is available to it.¹⁴¹

In his view, the regulations controlled the rule.¹⁴² Thus, Judge Fernandez reasoned any change in the rule should be brought about through a change in the regulations, not a change in their interpretation.¹⁴³

136. *Butros v. INS*, 990 F.2d 1142, 1146 (1993).

137. *Id.*

138. *Id.*

139. *Id.* (distinguishing *Chu v. INS*, 875 F.2d 777 (9th Cir. 1989)). In *Chu*, the BIA had affirmed the immigration judge's deportation order. *Chu*, 875 F.2d at 779. *Chu* then moved that the BIA reconsider. *Id.* Before the BIA ruled on his motion to reconsider, *Chu* petitioned the Ninth Circuit for review. *Id.* The *Chu* court dismissed the petition for review because the *pending* motion for BIA reconsideration rendered the deportation order non-final. *Id.* at 780-81.

140. *Butros*, 990 F.2d at 1146 (citing *Avila-Murrieta v. INS*, 762 F.2d 733, 735 (9th Cir. 1985)).

141. *Butros*, 990 F.2d at 1146 (“[It] is not to say that a particular person will make a convincing argument for reopening; it is just to say that the person is not precluded at the outset.”).

142. *See id.*

143. *Id.*

C. THE DISSENT¹⁴⁴

Judge Trott prefaced his analysis by castigating Butros and the system which has allowed him to stay in the United States.¹⁴⁵ Judge Trott wrote:

Butros was ordered deported on May 26, 1988—almost five years ago. I write this dissent on March 15, 1993. Butros is still here. He has abused the privilege of living in this country by using and selling cocaine, the latter while on probation no less. When caught, he lied and arrogantly attempted to manipulate the system. Now, he claims he is entitled to another chance to convince the INS he merits discretionary relief. Butros' statement to Fisher that the government is powerless to do anything to him was prescient.¹⁴⁶

Judge Trott began his analysis by exposing the paradox created by applying different rules based solely on whether or not the alien has satisfied the seven-year requirement.¹⁴⁷ He then criticized the majority's choice of a *de novo* review.¹⁴⁸ Judge Trott next analyzed and approved the BIA's reasoning in establishing its rules which the majority struck down.¹⁴⁹ Judge Trott proceeded to review the current state of the law in different circuits.¹⁵⁰

1. *Paradox Created by the Diverging Rules in the Ninth Circuit*

Judge Trott criticized the majority's opinion as being contradictory. Judge Trott explained that the majority's analysis

144. *Butros v. INS*, 990 F.2d 1142, 1146 (9th Cir. 1993) (Trott, J., dissenting, joined by Brunetti, J.).

145. *Id.* at 1146-47.

146. *Id.* at 1147. Fisher was a Special Agent of the Portland Immigration Office. R.B. at 6.

147. *Butros*, 990 F.2d at 1147.

148. *Id.* at 1148.

149. *Id.* at 1150. Judge Trott opined that the BIA's rule to terminate LPR status upon the entry of a final administrative order of deportation was "a cogent solution to a problem which has no obvious or clear answer. As such, [Judge Trott] would accord the BIA's solution the considerable weight it is due under *Chevron*." *Id.*

150. *Id.* at 1151.

categorizes an alien as an LPR for the purpose of moving to reopen deportation proceedings but not as an LPR for the related purpose of accumulating time toward the seven-year requirement.¹⁵¹

2. *Standard of Review*

Judge Trott flatly disagreed with the majority's choice of a *de novo* standard of review.¹⁵² Observing that the decision turned "not on statutory construction, but on the workings of regulations," he concluded that "the cited standard of review is irrelevant to the analysis."¹⁵³ Rather, when reviewing a federal administrative agency's decision, he favored according deference to the "agency's interpretation of its governing statute with respect to the filling of 'any gap left, implicitly or explicitly, by Congress.'" ¹⁵⁴

Judge Trott approved of the explanation of this rule of deference as presented in *Chevron U.S.A. v. Natural Resources Defense Council*.¹⁵⁵ According to *Chevron*, a reviewing court determines whether Congress has directly spoken to the precise question at issue.¹⁵⁶ If their intent is clear, the court as well as the agency must abide by the "unambiguously expressed intent of Congress."¹⁵⁷ In the event Congress has not directly addressed the precise question, the court should only consider whether "the administrative agency's standard is based on a permissible construction of the statute."¹⁵⁸ Judge Trott observed that the

151. *Butros v. INS*, 990 F.2d 1142, 1147 (Trott, J., dissenting). The distinction exposed by Judge Trott does not follow from the definitions of either the word "lawful" or "resident" or any combination thereof. See BLACK'S LAW DICTIONARY, 885, 1309 (6th ed. 1990).

152. *Butros v. INS*, 990 F.2d 1142, 1148 (9th Cir. 1993) (Trott, J., dissenting). Under a *de novo* standard of review, the Ninth Circuit could impose its own interpretation of § 212(c) on the BIA. Under the deferential standard of review favored by Judge Trott, the Ninth Circuit's role would be limited to asking only whether the BIA's interpretation was permissible. Judge Trott wrote, "the [majority's] opinion claims *de novo* power to interpret the statutes under consideration and to tell the INS how to construe and apply its regulations regarding motions to reopen. I respectfully believe the law is to the contrary." *Id.*

153. *Id.*

154. *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

155. *Butros*, 990 F.2d at 1148 (citing *Chevron*, 467 U.S. 837, 842-43 (1984)).

156. *Chevron*, 467 U.S. at 842.

157. *Id.*

158. *Id.*

Ninth Circuit had followed the *Chevron* approach in *Ayala-Chavez v. INS*¹⁵⁹ with respect to § 212(c) interpretation.¹⁶⁰ Such an approach, he opined, would preserve national uniformity in the treatment of an agency's application of federal law.¹⁶¹

In Judge Trott's opinion, Butros' appeal dealt with a gap in the law.¹⁶² The statutes were silent on when eligibility for § 212(c) relief, as well as accrual of time toward the seven-year requirement, terminates.¹⁶³ The statutes were also silent on reopening and reconsidering deportation proceedings.¹⁶⁴ According to Judge Trott, it was the agency's regulations, and not the statute, which governed Butros' motion to reopen and to reconsider.¹⁶⁵ For these reasons, Judge Trott would have accorded deference to the BIA's interpretation of the statute and would not have applied a *de novo* standard of review.¹⁶⁶

3. Soundness of the BIA's Rule

Judge Trott identified the issue in this case as being "whether an alien who has *conceded* deportability and been denied discretionary relief under § 212(c) of the Act may be precluded by the [BIA] from making a motion to *reopen* for additional § 212(c) *discretionary* consideration on the ground the alien is no longer eligible for such consideration."¹⁶⁷ Judge Trott recognized that the BIA deemed an alien statutorily ineligible

159. 944 F.2d 638 (9th Cir. 1990). The *Ayala-Chavez* court gave considerable deference to the BIA's statutory interpretation. *Id.* at 641. It further noted:

[C]ourts have always interpreted broadly the discretionary authority of the Attorney General to grant or deny waiver of deportation. Inherent in this discretion is the authority of the Attorney General and his subordinates to establish general standards that govern the exercise of such discretion, as long as these standards are rationally related to the statutory scheme.

Id.

160. *Butros*, 990 F.2d at 1148.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (citing *INS v. Doherty*, 112 S. Ct. 719 (1992) (holding the authority for reopening deportation proceedings is derived solely from regulations promulgated by the Attorney General)).

165. *Butros*, 990 F.2d at 1148.

166. *See id.*

167. *Butros v. INS*, 990 F.2d 1142, 1149 (9th Cir. 1993) (Trott, J., dissenting).

for § 212(c) relief when a deportation order becomes administratively final.¹⁶⁸ At such time, a motion to reopen would not be entertained.¹⁶⁹ He noted that the Ninth Circuit, prior to *Butros*, had followed this approach.¹⁷⁰

Judge Trott proceeded to analyze the BIA's position with respect to terminating lawful domicile, and § 212(c) eligibility, at the time of an administratively final deportation order.¹⁷¹ He concluded that "[i]t makes no logical sense to grant a motion to *reopen* deportation proceedings for the purpose of considering an alien's application for § 212(c) relief when an alien has lost *prima facie* eligibility for such relief because he or she is no longer is (sic) a permanent resident."¹⁷² As the BIA's determination as to *Butros* was "a cogent solution to a problem which has no obvious or clear answer," Judge Trott would accord it deference and preserve *Gonzales*.¹⁷³

4. Circuit Split

Judge Trott reviewed the discordant views of other circuits with respect to terminating eligibility for § 212(c) relief.¹⁷⁴ He observed that the Fifth and Seventh Circuits affirmed the BIA's conclusion to terminate eligibility when a deportation order becomes administratively final.¹⁷⁵ He stressed that such a rule is sensible as "it gives the alien ample time to assert his claim for § 212(c) relief and prevents him from litigating his various claims in piecemeal fashion."¹⁷⁶

Judge Trott then recognized how infidelity to the BIA's position has led to a multi-faceted circuit split.¹⁷⁷ He speculated that such a split assures only uncertainty in the INS's quest to

168. *Id.* at 1150.

169. *Id.*

170. *Id.* (citing *Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Butros v. INS*, 990 F.2d 1142, 1151-53 (9th Cir. 1993).

175. *Id.* at 1151 (citing *Variamparambil v. INS*, 831 F.2d 1362 (7th Cir. 1987); *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987)).

176. *Id.* at 1151 (citing *Rivera*, 810 F.2d at 542).

177. *See id.* at 1152.

equitably enforce the law across the nation.¹⁷⁸ In particular, Judge Trott noted the Eleventh Circuit's choice to terminate eligibility when the order to show cause is issued, as well as the Second Circuit's exception for deportation orders which are not challenged on the merits.¹⁷⁹ He postulated that the majority's holding would raise "more questions than it answers."¹⁸⁰ He questioned whether

a motion to reconsider the denial of a motion to reopen [would] prevent the quickening of finality? . . . Will these proceedings ever come to a conclusion? The majority opinion would do well to give this new rule more thought and more substance. It would appear, as it does to the INS, that this new rule "would recognize no finality (other than the 'physical deportation' of the alien from the United States) to an alien's right to seek reopening of deportation proceedings to further pursue an application for such relief even beyond the point that a loss of lawful permanent resident status clearly has occurred."¹⁸¹

Judge Trott expressed concern over adopting a new interpretation to a statute which is already disparately applied by the various circuits.¹⁸² He would have affirmed *Gonzales*, thereby maintaining allegiance, and observing deference, to the BIA's interpretation of § 212(c).¹⁸³

V. CRITIQUE

The Ninth Circuit, in *Butros v. INS*,¹⁸⁴ ruled that a deportation order, affirmed by the BIA, is *not* final so long as the case is appealable or the BIA is able to reopen or reconsider the case on its own motion.¹⁸⁵ Consequently, an alien under a non-final deportation order retains LPR status, and lawful domicile, for

178. *Id.*

179. *Id.* at 1151 (citing *Marti-Xiques v. INS*, 741 F.2d 350, 355 (11th Cir. 1984) and *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991)).

180. *Butros*, 990 F.2d at 1151.

181. *Id.* (citing *Matter of Cerna*, Int. Dec. 3161 app. at 11 n. 1 (BIA Oct 7, 1991)).

182. See *Butros*, 990 F.2d at 1152.

183. *Id.* at 1153.

184. *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993).

185. *Id.* at 1145.

purposes of seeking § 212(c) relief.¹⁸⁶ Because the BIA is precluded from reopening or reconsidering only when an alien has physically departed the country, the rule, in effect, does not recognize a deportation order to be final while an alien remains in the United States.¹⁸⁷

Naim Butros obviously benefitted from the ruling because it allowed him to stave off imminent deportation and argue his motion to reopen and reconsider his case, for purposes of seeking § 212(c) relief.¹⁸⁸ As to Butros, such a *result* is fair, given the peculiar set of facts in his case.¹⁸⁹ However, the Ninth Circuit's rule is problematic because its inherent uncertainty may produce unintelligible distinctions or incongruous results.¹⁹⁰ It also adds a new interpretation to the growing circuit split enveloping § 212(c).¹⁹¹

The existing confusion could have been prevented had the Ninth Circuit abolished the requirement that aliens maintain present LPR status to preserve § 212(c) eligibility.¹⁹² The present-LPR-status requirement was created in *Gonzales v. INS*,¹⁹³

186. The Ninth Circuit expressly declined to decide whether the same alien would retain LPR status for purposes of accumulating time toward the seven-year requirement. *Id.* at 1146.

187. See 8 C.F.R. § 3.2; see also *supra* note 26 for the text of the regulation.

188. *Butros*, 990 F.2d at 1146.

189. Recall that Butros has lived in the United States since the age of six. *Id.* at 1142. His family resides lawfully in the United States. See *supra* note 21. His involvement with drugs stemmed from legally prescribed doses of Percodan, a dependency-causing drug, following a severe motorcycle accident. See *supra* note 18.

190. See *infra* notes 244-49 discussing potential problems created by the *Butros* rule.

The Ninth Circuit's ruling also stands to benefit deportable aliens who cannot be physically deported. See, e.g., 8 U.S.C. § 1253(g) (1988) (imposing sanctions on countries which deny or delay acceptance of deportees); 8 U.S.C. § 1253(h) (Supp. IV 1992) (restricting physical deportation when the alien's life or freedom would be threatened in the destined country). Under the *Butros* rule, a deportable alien who cannot be physically deported could not be considered to have lost LPR status. See 8 C.F.R. § 3.2; see *supra* note 26 for the text of the regulation. Under the *Butros* rule such aliens, unlike their counterparts who had been physically deported, could likely maintain indefinite eligibility for § 212(c) relief. Such a result is unfair because the distinguishing characteristic—conditions in the country the alien would be deported to—is, first, beyond the alien's control and, second, logically unrelated to statutory eligibility for § 212(c) relief.

191. See *infra* notes 250-60 and accompanying text discussing the growing circuit split.

192. See *infra* notes 261-80 and accompanying text discussing such an approach.

193. 921 F.2d 236 (9th Cir. 1990).

through a misunderstanding of *Matter of Lok II*.¹⁹⁴ Although *Butros* overruled *Gonzales*, it passively affirmed *Gonzales*' present-LPR-status requirement.¹⁹⁵ Had the Ninth Circuit correctly interpreted *Matter of Lok II*, they could have afforded Butros the relief he fairly deserved and avoided the present enigmatic fallout.

A. THE NINTH CIRCUIT'S MISINTERPRETATION OF *MATTER OF LOK II*

The Ninth Circuit, in *Butros v. INS*,¹⁹⁶ as well as in *Gonzales v. INS*,¹⁹⁷ arguably misinterpreted the BIA's position in *Matter of Lok II*.¹⁹⁸ In *Matter of Lok II*, Tim Lok had not attained the requisite seven years of lawful domicile when his deportation order became administratively final.¹⁹⁹ By the time the case had passed through the immigration judge, the BIA (first-time),²⁰⁰ the Second Circuit,²⁰¹ back to the BIA on remand,²⁰² back to the immigration judge on remand, and was certified to the BIA (second-time),²⁰³ Lok had attained a seven-year domicile.

The BIA, obviously disturbed by the prospect of aliens accumulating seven years of domicile while their cases were on appeal, held Lok's *lawful* domicile expired when the original deportation order became administratively final.²⁰⁴ An important factor in the BIA's reasoning was avoiding the incentive an opposite conclusion would create for aliens to file "spurious appeals," thereby accumulating time toward the seven-year requirement.²⁰⁵ Accordingly, the BIA ruled that an administratively final deportation order terminates LPR sta-

194. See *infra* notes 197-220 and accompanying text discussing the *Gonzales* court's misinterpretation of *Matter of Lok II*.

195. See *infra* notes 226-34 and accompanying text discussing *Butros*' passive affirmation of the *Gonzales* requirement.

196. 990 F.2d 1142 (9th Cir. 1993).

197. 921 F.2d 236 (9th Cir. 1990).

198. 18 I. & N. Dec. 101 (1981).

199. *Id.* at 104.

200. *Matter of Lok I*, 15 I. & N. Dec. 720 (1976). Lok's lawful domicile commenced in 1971. *Id.* at 721.

201. *Tim Lok I*, 548 F.2d 37 (2d Cir. 1977).

202. *Matter of Lok*, 16 I. & N. Dec. 441 (1978).

203. *Matter of Lok II*, 18 I. & N. Dec. 101 (1981).

204. *Id.* at 110.

205. *Id.* at 107.

tus.²⁰⁶ At the time of administrative finality, Lok had accrued a lawful domicile of less than five years.²⁰⁷ Thus, Lok was held statutorily ineligible for § 212(c) relief.²⁰⁸

The *Matter of Lok II* holding is susceptible to two interpretations. Either Lok did not satisfy the seven-year domicile requirement, or present LPR status is required to apply for § 212(c) relief.²⁰⁹ A close reading of *Matter of Lok II* suggests that Lok's motion was denied solely because he did not satisfy the seven-year lawful domicile requirement.²¹⁰

The BIA's opinion contained two headings, "Termination of Lawful Permanent Resident Status,"²¹¹ followed later by "Lawfulness of Domicile Prior to Admission as Lawful Permanent Resident."²¹² The analysis regarding the termination of LPR status upon the administrative finality of a deportation order was fully contained under the first heading.²¹³ Had the BIA required present LPR status to apply for § 212(c) relief, they could have found Lok statutorily ineligible without having to discuss the commencement of his lawful domicile under the second heading. The BIA must have proceeded to discuss the commencement of Lok's lawful domicile, then, because it did not require present LPR status as a prerequisite for § 212(c) eligibility. Viewed this way, the BIA's intent in *Matter of Lok II*, seems clear—determine whether Lok had a seven-year domicile by establishing when his lawful domicile began and ceased.²¹⁴ It seems apparent that the BIA never intended to re-

206. *Id.* at 105.

207. *Id.*

208. *Id.*

209. Under either interpretation, Tim Lok would have been statutorily ineligible for § 212(c) because he possessed less than seven years of lawful domicile and because his LPR status terminated before he sought relief.

210. See *Matter of Lok II*, 18 I. & N. Dec. at 105-10.

211. *Id.* at 105.

212. *Id.* at 108. Under this heading, the BIA discussed whether the time Lok spent in the United States prior to obtaining LPR status would count toward his seven-year lawful domicile.

213. See *id.* at 105-07.

214. The BIA concluded:

On the basis of the foregoing discussion, we conclude that the respondent's lawful domicile began with his admission for lawful permanent residence on December 26, 1971, and ended with the termination of his lawful permanent resident status on July 30, 1976, when the order of deportation outstanding

quire an alien maintain present LPR status when applying for § 212(c) relief.

The Ninth Circuit, in *Gonzales*, misinterpreted *Matter of Lok II* to require present LPR status.²¹⁵ Accordingly, the Ninth Circuit believed that an administratively final deportation order, which divests an alien's LPR status, serves as an absolute bar to seeking § 212(c) relief.²¹⁶ As a result, the Ninth Circuit effectively requires deportable alien to possess present LPR status when applying for § 212(c) relief from deportation.²¹⁷ This result appears to contradict the purpose behind offering relief from deportation. If deportability acts as a bar to seeking § 212(c) relief from deportation, then an alien would only be allowed to seek relief from deportation while not deportable—while still recognized as a *lawful permanent resident* of the United States.

A misinterpretation of *Matter of Lok II* resulted in the paradox embodied in *Gonzales*. The *Butros* court, perhaps seeking to avoid imposing an absolute bar to seeking relief, overruled *Gonzales* to the extent that *Gonzales* terminated LPR status at the time of an administratively final deportation order.²¹⁸ However, since the *Butros* court incorrectly interpreted *Matter of Lok II*, as did the *Gonzales* court, the resulting modification has, arguably, caused more confusion than resolution. For example, the *Butros* court left open whether the rule would be applied to aliens who have not met the seven-year requirement.²¹⁹ The *Bu-*

against him became administratively final. We thus hold that the respondent is statutorily ineligible for the relief he seeks under section 212(c) of the [INA].

Id. at 110.

215. See *Gonzales*, 921 F.2d at 238.

216. *Id.*

217. *Id.* at 239.

218. *Butros*, 990 F.2d at 1145.

219. *Id.* at 1146. If the *Butros* rule is applied to aliens with a sub-seven-year lawful domicile, then these aliens could become eligible for § 212(c) relief while their cases proceeded through the courts. This result is undesirable as it could lead to the filing of spurious appeals to keep the case in court. See, e.g., *Matter of Lok II*, 18 I. & N. Dec. at 107 (1981).

If the *Butros* rule is not applied to aliens with a sub-seven-year lawful domicile, then the Ninth Circuit's distinction would be arbitrary. For example, a deportation order issued by the BIA would be sufficiently final to terminate the LPR status of an alien with a sub-seven-year lawful domicile, whereas an equivalent deportation order would not be sufficiently final to terminate the LPR status of an alien with a seven-year-plus lawful

tros court also declined to decide whether aliens under administratively final deportation orders could continue to accord relatives visa preferences.²²⁰

B. OVERRULING *GONZALES*

*Butros v. INS*²²¹ and *Gonzales v. INS*²²² presented remarkably similar fact patterns.²²³ Nevertheless, *Butros* overruled *Gonzales* insofar as the latter terminated LPR status at the time of an administratively final deportation order.²²⁴ The second component of *Gonzales*, that LPR status is required at the time § 212(c) relief is sought, was passively affirmed.²²⁵

1. *The Ninth Circuit Justifiably Overruled Gonzales But Passively Affirmed the LPR-Status Requirement*

The Ninth Circuit, in *Butros v. INS*,²²⁶ asserted that “the

domicile. The Ninth Circuit’s recognition of a final deportation order would necessarily hinge on whether or not the alien possessed a seven-year lawful domicile. This result is also undesirable because the finality of a deportation order is logically unrelated to the length of an alien’s lawful domicile.

220. *Butros*, 990 F.2d at 1146. If the *Butros* rule allowed aliens under administratively final deportation orders to accord relatives visa preferences, then such aliens could petition relatives into the United States while they, themselves, are in the process of exiting the country. This result is obviously undesirable. See, e.g., *Matter of Lok II*, 18 I. & N. Dec. at 106 (1981) (labeling such a scenario an “incongruous result.”).

If the *Butros* rule did not allow aliens under administratively final deportation orders to accord relatives visa preferences, then the alien would not really have complete LPR status. The Ninth Circuit would have to recognize a quasi-LPR status which allows the alien some, but not all, benefits of lawful residence in the United States. This result is also undesirable because it opens the door to limiting the LPR status of legal immigrants.

221. 990 F.2d 1142 (9th Cir. 1993).

222. 921 F.2d 236 (9th Cir. 1990).

223. Both *Butros* and *Gonzales* lawfully resided in the United States for well over seven years before being charged with deportation. See *Butros*, 990 F.2d at 1142-43; *Gonzales*, 921 F.2d at 237. Both conceded deportability but sought § 212(c) relief. *Butros*, 990 F.2d at 1143; *Gonzales*, 921 F.2d at 237. In both cases, § 212(c) relief was denied and the deportation order was affirmed by the BIA. *Butros*, 990 F.2d at 1143; *Gonzales*, 921 F.2d at 237. Both *Butros* and *Gonzales* then made a motion pursuant to 8 C.F.R. § 3.2 asking the BIA to reevaluate the denial of § 212(c) relief. *Butros*, 990 F.2d at 1143; *Gonzales*, 921 F.2d at 237. The BIA denied the motions because the alien lost LPR status upon the administrative finality of the deportation order. *Butros*, 990 F.2d at 1143; *Gonzales*, 921 F.2d at 238.

224. *Butros*, 990 F.2d at 1145.

225. See *Butros*, 990 F.2d 1142.

226. 990 F.2d 1142 (9th Cir. 1993).

fallacy of *Gonzales* is the belief that what is final for certain administrative purposes is final for all purposes."²²⁷ The *Butros* court then reasoned that an administratively final deportation order may not be truly final because the BIA could reopen or reconsider,²²⁸ and had done so in the past.²²⁹ Accordingly, recognition of finality was extended to the point at which the BIA could no longer reopen or reconsider the case.²³⁰

The *Butros* court overruled *Gonzales* and redefined finality.²³¹ Conversely, the court passively affirmed the *Gonzales* requirement that an alien must possess present LPR status to be eligible for § 212(c) relief.²³² The *Gonzales* requirement was based on a misinterpretation of *Matter of Lok II*.²³³ It is unsupported by statutory language or legislative history.²³⁴ The requirement even defies common sense: If the purpose of § 212(c) is to offer relief from deportation and if deportation terminates LPR status, would it not defeat § 212(c)'s purpose to require LPR status to seek relief from deportation? If the Ninth Circuit were to answer "No," then isn't § 212(c) relief from deportation available to only those aliens who have *not* been found deportable?

As justification for overruling *Gonzales*, the *Butros* court seized upon *Gonzales*' illogical concern that aliens who had departed the country would qualify for § 212(c) relief.²³⁵ The *Butros* court correctly pointed out that the BIA's regulations expressly prevented physically-departed aliens from moving to reopen or reconsider.²³⁶ The *Gonzales* court apparently ignored

227. *Id.* at 1145 (criticizing *Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990)).

228. The BIA is only prohibited from reopening or reconsidering cases of aliens who have physically departed the country. See 8 C.F.R. § 3.2; see *supra* note 26 for the text of the regulation.

229. *Butros*, 990 F.2d at 1145.

230. See *id.*

231. *Id.* at 1145.

232. See *id.* at 1144-46.

233. 18 I. & N. Dec. 101; see *supra* notes 197-220 and accompanying text describing how the misinterpretation arose.

234. See *supra* note 2 for the language of the statute. Recall, the legislative discussions regarding § 212(c) did not anticipate its application to deportation proceedings.

235. *Butros*, 990 F.2d at 1145-46.

236. *Id.*; see 8 C.F.R. § 3.2 ("A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States.").

judicial affirmance of the administratively final deportation order as a stage, prior to the physical-departure stage, when an alien could be deemed to have lost LPR status.²³⁷ Had the Ninth Circuit been solely interested in correcting this oversight, the appropriate solution, in *Butros*, could have been to rule that an alien loses LPR status *only after review by the Ninth Circuit*.²³⁸ By ruling that for purposes of § 212(c) relief, an alien maintains eligibility until physical deportation and not until the deportation order is judicially affirmed, the Ninth Circuit displayed its willingness to correct *Gonzales* but failed to address the underlying problem at *Gonzales*' core.

2. *In Overruling Gonzales, the Ninth Circuit Has Created Different Deference Standards With Respect to the Commencement and Termination of Lawful Domicile*

In overruling *Gonzales v. INS*,²³⁹ the Ninth Circuit declined to defer to the BIA's judgment as to when lawful domicile *terminates*.²⁴⁰ This decision cannot be reconciled with the Ninth Circuit's decision to defer to the BIA on the issue of when lawful domicile *commences*.²⁴¹ Such selective deference is no deference at all. The Ninth Circuit seemingly professes to defer to the BIA's reasoned judgment, *but only if it agrees with that judgment*.

237. See *Gonzales*, 921 F.2d at 238-41. Judicial affirmance of an administratively final deportation order is precisely the third stage the BIA considered. See *supra* note 79 and accompanying text listing the stages upon which the deportation order could be deemed final.

238. This solution more appropriately addresses *Gonzales*' concern regarding indefinite § 212(c) eligibility. Viewed in terms of the four stages suggested by the BIA, in *Matter of Lok II*, the *Gonzales* court feared the fourth stage. See *Matter of Lok II* 18 I. & N. Dec. 101, 105 (1981) (describing the second stage as administrative finality, the third stage as judicial finality, and the fourth stage as physical departure); see also *supra* notes 76-80 and accompanying text discussing the BIA's four-stage analysis. The *Gonzales* court strongly disapproved of the fourth stage and responded by adopting the second stage. Inexplicably, they skipped over the third stage without apparently recognizing its existence. If this oversight was all the *Butros* court sought to correct, they could have limited their holding to terminate LPR status at the third, and not the fourth, stage.

239. 921 F.2d 236 (9th Cir. 1990).

240. See *Butros v. INS*, 990 F.2d 1142, 1144-46 (9th Cir. 1992). Recall, the domicile accrued by an alien while an LPR qualifies as a lawful domicile. Therefore, once stripped of LPR status, the alien's lawful domicile simultaneously ends.

241. *Castillo-Felix v. INS*, 601 F.2d 459, 465 (9th Cir. 1979). See also *supra* note 74 discussing the commencement of lawful domicile.

The *Butros* decision is better understood by analyzing the context in which it was decided. First, the majority may have been swayed by the facts and was thus compelled to grant relief. Recall, Butros had a relatively low degree of criminal involvement²⁴² and deportation would have inflicted a severe hardship upon him.²⁴³ Second, such relief could not be granted unless *Gonzales* was distinguished or overruled. Since the material facts in *Gonzales* paralleled those in *Butros*, distinguishing the cases, convincingly, would likely have been difficult. Finally, the majority did not observe the fine distinction within *Matter of Lok II*—that LPR status is only required to calculate the seven-year lawful domicile requirement and not to file a motion to reopen or reconsider the denial of § 212(c) relief. The net result is a rule which partially compensates for *Gonzales*' shortcomings, but unwisely preserves an alien's LPR status beyond the point of an administratively final deportation order.

C. POTENTIAL PROBLEMS CAUSED BY THE *BUTROS* RULE

The Ninth Circuit, in *Butros v. INS*,²⁴⁴ emphasized that it was not deciding "when an alien ceases to accumulate credit toward seven years of lawful permanent residence."²⁴⁵ However, to prevent those aliens with a sub-seven-year lawful domicile from benefitting under the *Butros* rule, the Ninth Circuit, in future cases, would have to either (1) terminate an alien's LPR status *only if the alien did not possess a seven-year lawful domicile when the deportation order became administratively final* or (2) rule that at the time of an administratively final deportation order, an alien loses LPR status *unless the alien is seeking to reopen or reconsider deportation proceedings to seek § 212(c) relief*.

242. Cf. *Gonzales*, 921 F.2d at 237. *Gonzales* had been convicted of four unrelated crimes: (1) in 1976, for receiving stolen property; (2) in 1983, for disturbing the peace; (3) in 1984, for aiding and abetting an armed robbery; and (4) in 1985, for being under the influence of heroin and for possession of a hypodermic needle.

By contrast Butros' record reflected only one conviction at the time of his § 212(c) hearing. See *supra* notes 16-19 and accompanying text discussing Butros' criminal involvement.

243. See *supra* notes 18 and 21 relating facts which suggest that deportation would severely penalize Butros.

244. 990 F.2d 1142 (9th Cir. 1993).

245. *Butros*, 990 F.2d at 1146.

Both alternatives are flawed. Under the first option, aliens possessing seven-years of lawful domicile would not lose their LPR status until physically deported.²⁴⁶ Thus, such aliens awaiting the flight back home would be entitled to all the rights and privileges reserved for LPRs. Such deportable aliens could then sponsor relatives to enter the United States as LPRs.²⁴⁷ In the event deportation could not be completed,²⁴⁸ the legal status of such aliens would be unaffected by the deportation process. Such results are quite obviously unacceptable.

Under the second option, aliens moving to reopen or reconsider deportation proceedings to seek § 212(c) relief would retain LPR status, whereas non-moving aliens would not. Such a rule is wholly undesirable because the determination as to an alien's *lawful permanent resident* status would lie within the alien's, and not the government's, control. Such a scenario could arguably motivate the filing of spurious motions to reopen or reconsider an adverse ruling by the BIA to preserve LPR status. It could also foreseeably lead to inconsistent LPR-status classifications. For example, an alien would be considered an LPR to move to reopen or reconsider the denial of § 212(c) relief, but the same alien would not be considered an LPR for the related purpose of accumulating time toward the seven-year requirement.²⁴⁹

D. THE NINTH CIRCUIT'S ADDITION TO THE CIRCUIT SPLITTING PROBLEM

The Ninth Circuit's ruling has also added more complexity to an area of the law already replete with inconsistencies.²⁵⁰ With respect to when lawful domicile commences, at present,

246. See 8 C.F.R. § 3.2; see *supra* note 26 for the text of the regulation.

247. See *Matter of Lok II*, 18 I. & N. Dec. 101, 106 (1981) (disapproving of a rule which allowed deportable aliens to accord relatives visa preference so long as the aliens remain in this country).

248. See, e.g., 8 U.S.C. § 1253(g) (imposing sanctions on countries which deny or delay acceptance of deportees); 8 U.S.C. § 1253(h) (Supp. IV 1992) (restricting physical deportation when the alien's life or freedom would be threatened in the destined country).

249. See *Butros*, 990 F.2d at 1147 (Trott, J., dissenting).

250. *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993). See *supra* notes 73-108 and accompanying text for a detailed discussion of the various § 212(c) interpretations employed by circuit courts.

the Fourth and Ninth Circuits follow the BIA's approach requiring the alien to establish a lawful domicile after being lawfully admitted for permanent residence.²⁵¹ The Second and D.C. Circuits, however, may allow the alien to accrue the time he lawfully resided in the United States, prior to admission as an LPR, as part of his lawful domicile.²⁵²

With respect to when lawful domicile terminates, the Fifth and Seventh Circuits abide by the BIA's reasoning in terminating lawful domicile upon an administratively final deportation order.²⁵³ The Second and Ninth Circuits agree with the BIA so long as the alien has conceded deportability.²⁵⁴ The Eleventh Circuit, through its simple and effective, though extremely harsh, solution, terminates lawful domicile when the order to show cause is issued.²⁵⁵

With respect to motions to reopen or reconsider the denial of § 212(c) relief, the Ninth Circuit, prior to *Butros*, required that the alien possess present LPR status to maintain statutory eligibility.²⁵⁶ The Second Circuit apparently allows such motions if the alien was statutorily eligible when deportation proceedings began.²⁵⁷

Despite the existing multiplicity of § 212(c) constructions, the Ninth Circuit has now unveiled its own peculiar interpretation,²⁵⁸ one that is as distinct from the prevailing views as they are from each other.²⁵⁹ With so many different applications of

251. See *Chiravacharadhikul v. INS*, 645 F.2d 248, 250 (4th Cir. 1981); *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979); *Matter of Lok I*, 15 I. & N. Dec. 720 (1976).

252. See *Tim Lok I*, 548 F.2d 37, 40 (2d Cir. 1977); *Anwo v. INS*, 607 F.2d 435, 437 (D.C. Cir. 1979).

253. See *Rivera v. INS*, 810 F.2d 540, 542 (5th Cir. 1987); *Variamparambil v. INS*, 831 F.2d 1362, 1366 (7th Cir. 1987); *Matter of Lok II*, 18 I. & N. Dec. 101, 105 (1981); see also *supra* notes 76-80 and accompanying text discussing the BIA's reasoning.

254. See *Tim Lok II*, 681 F.2d 107, 110 (2d Cir. 1982); *Wall v. INS*, 722 F.2d 1442, 1444 (9th Cir. 1984).

255. See *Marti-Xiques v. INS*, 741 F.2d 355 (11th Cir. 1984); see also *supra* notes 83-85 and accompanying text discussing the Eleventh Circuit's approach.

256. See *Gonzales v. INS*, 921 F.2d 236, 238 (9th Cir. 1993); see also *supra* notes 96-101 and accompanying text discussing the *Gonzales* rationale.

257. See *Vargas v. INS*, 938 F.2d 358, 361 (2d Cir. 1991); see also *supra* notes 102-04 and accompanying text discussing the Second Circuit's view.

258. See *Butros*, 990 F.2d at 1145.

259. *Id.* at 1151-53 (Trott, J., dissenting); see also *supra* notes 176-85 and accompanying text summarizing Judge Trott's discussion of the various views.

the same federal statute, Judge Trott was certainly prudent to admonish "[w]hat happens to an alien in this context depends entirely on *where* it happens."²⁶⁰

E. THE BETTER VIEW

The better solution would be to terminate LPR status at the time of administrative finality but to abolish the present-LPR-status requirement as a prerequisite to seeking § 212(c) relief. Thus, non-LPR aliens would be eligible for § 212(c) relief so long as they maintained a seven-year lawful domicile prior to the deportation order. Likewise, a motion to reopen or reconsider the denial of § 212(c) relief should not be barred solely because the alien does not possess LPR status when making the motion. Under this approach, Butros would still be allowed to move to reopen or reconsider the denial of § 212(c) relief because he possessed the requisite seven-year lawful domicile before being found deportable.²⁶¹

1. *The Proposed Solution is Consistent With Matter of Lok II and the Second Circuit's Approach*

Abolishing the requirement that an alien possess present LPR status to maintain eligibility for § 212(c) is consistent with *Matter of Lok II*.²⁶² There, the BIA ruled that an administratively final deportation order terminates LPR status.²⁶³ The BIA then *held* Lok to be statutorily ineligible for § 212(c) relief.²⁶⁴ The Ninth Circuit has since inferred that termination of LPR status automatically renders an alien statutorily ineligible for § 212(c) relief.²⁶⁵

The proposed solution dispels this inference. Rather, it interprets the termination of LPR status as affecting only the calculation of the alien's lawful domicile. Once LPR status is terminated, courts and the BIA must still ask whether the alien

260. *Butros*, 990 F.2d 1142, 1152 (Trott, J., dissenting).

261. See *Butros v. INS*, 990 F.2d 1142, 1143 (9th Cir. 1993).

262. 18 I. & N. Dec. 101 (1981).

263. *Id.* at 105.

264. *Id.* at 110.

265. See *Gonzales v. INS*, 921 F.2d 236, 238 (9th Cir. 1990).

possessed seven years of lawful domicile. If the alien did not, a motion to reopen or reconsider would have to be denied not because the alien had lost status as one "lawfully admitted for permanent residence" but because the alien did not possess seven years of lawful domicile. Simply stated, present LPR status should not be required to move to reopen or reconsider the denial of § 212(c) relief from deportation.

Such an interpretation is perfectly consistent with the *Matter of Lok II* holding, as Lok would be barred from reopening or reconsidering because he possessed less than five years of lawful domicile at the time his deportation order became administratively final.²⁶⁶ If an alien possessed seven years of lawful domicile at some point prior to administrative finality, however, then a later motion to reopen or reconsider should be entertained.²⁶⁷

This interpretation is also consistent with the Second Circuit's handling of motions to reopen the denial of § 212(c) relief.²⁶⁸ In *Vargas v. INS*, the alien's factual setting mirrored that of Butros.²⁶⁹ Vargas arrived in the U.S. as an LPR when he was four years old.²⁷⁰ Sixteen years later, he was convicted of criminal possession of cocaine.²⁷¹ At the following deportation proceeding, Vargas conceded deportability but sought § 212(c) relief.²⁷² The immigration judge denied relief and the BIA later dismissed the appeal.²⁷³ Vargas moved to reopen to present new evidence, most notably the birth of a child and a following marriage.²⁷⁴ The BIA denied the motion to reopen under the belief that *Matter of Lok II* was controlling. The BIA reasoned that Vargas lost LPR status at the time his initial appeal was dismissed, that LPR status was necessary for § 212(c) eligibility, and that Vargas was thus statutorily ineligible for § 212(c) relief.²⁷⁵

266. See *Matter of Lok II*, 18 I. & N. Dec. at 104.

267. The alien will still have to meet a heavy burden in proving that reopening or reconsideration is warranted. See *Matter of Coelho*, Int. Dec. 3172 (BIA Apr 30, 1992).

268. See *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991).

269. See *supra* notes 16-31 and accompanying text for Butros' facts.

270. *Vargas*, 938 F.2d at 359.

271. *Id.*

272. *Id.*

273. *Id.* at 359-60.

274. *Id.* at 360.

275. See *id.* (citing *Matter of Lok II*, 18 I. & N. Dec. 101).

The Second Circuit, on appeal, distinguished *Matter of Lok II*.²⁷⁶ The *Vargas* court recognized that in *Matter of Lok II*, "the BIA denied the application of a permanent resident alien for Section 212(c) relief *because the alien had failed to accrue the required seven years of 'lawful unrelinquished domicile'* and was therefore statutorily ineligible."²⁷⁷ The *Vargas* court noted that "for purposes of calculating the seven-year requirement, Lok's status as a permanent resident ended when he failed to appeal the Immigration Judge's finding of deportability."²⁷⁸ The Second Circuit read *Matter of Lok II* to stand "only for the proposition that an alien cannot *become* eligible for discretionary relief through subsequent accrual of time towards the seven-year threshold, once he has conceded that he is deportable."²⁷⁹ The Second Circuit believed that if the alien was eligible for relief before conceding deportability, then a later finding of deportability would not divest such eligibility.²⁸⁰

2. *The Proposed Solution Should Be Followed Until Congress or the United States Supreme Court Acts With Respect to Section-212(c)-Type Relief From Deportation*

The panoply of § 212(c) interpretations quite obviously stems from good-faith judicial and administrative efforts to apply § 212(c) to proceedings the statute was never designed to affect.²⁸¹ As additional circuit courts address the issue, the potential for even further misapplication increases. Although the BIA and the circuit courts employ good-faith efforts to abide by the statutory purpose of § 212(c), the result has been a conglomeration of opposing and tangential views. Since the Ninth Circuit's decision in *Butros v. INS*,²⁸² the Third and Fourth Cir-

276. *Vargas*, 938 F.2d at 360 ("*Matter of Lok II*], however, is not an adequate basis for the BIA's position."); *id.* at 361 ("[t]he concern which motivated the creation of the rule in *Matter of Lok II*—preventing an alien from manipulating deportability proceedings so as to acquire the seven years of domicile—is not present here.").

277. *Id.* at 360-61 (emphasis added).

278. *Id.* (emphasis added).

279. *Id.*

280. *See id.*

281. *See Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993); *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991); *Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990); *Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir. 1984); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Lok II*, 18 I. & N. Dec. 101 (1981); *Matter of G.A.*, 7 I. & N. Dec. 274 (1956); *Matter of S.*, 6 I. & N. Dec. 392 (1954); *Matter of L.*, 1 I. & N. Dec. 1 (1940).

282. 990 F.2d 1142 (9th Cir. 1993).

cuits have criticized the Ninth Circuit's position in favor of the BIA's position.²⁸³ The First and Seventh Circuits, however, have chosen rules similar in effect to the *Butros* rule.²⁸⁴

The answer, apparently, lies not in judicial or administrative statutory construction but in new legislation which will assemble the sensible rules into a statute directly addressing deportation proceedings. Such a statute will prevent the courts from delving into the statutory purpose of § 212(c)—a process which, considering that the legislative discussion regarding § 212(c) did not anticipate its application to deportable aliens, is really little more than a farce. Barring the enactment of legislation, only the United States Supreme Court can universally clarify the rules.²⁸⁵ Until then, the circuit courts, as well as the BIA, would be wise to allow deportable aliens to move to reopen their cases so long as they had maintained a lawful domicile for the requisite seven years at some point prior to an administratively final deportation order.

VI. CONCLUSION

In *Butros v. INS*,²⁸⁶ the Ninth Circuit ruled that a deportation order is not final if the decision can be appealed or if the BIA can reopen or reconsider the case.²⁸⁷ Naim Butros was thus able to continue seeking § 212(c) relief. In its ruling the Ninth Circuit focused on the deportation order's finality and extended the point at which LPR status terminates. The Ninth Circuit could have achieved the same fair result by simply abolishing the present LPR status requirement for aliens seeking § 212(c) relief from deportation. Such a ruling would have streamlined the immigration laws rather than unduly complicating matters.

283. See *Katsis v. INS*, 997 F.2d 1067, 1075-76 (3d Cir. 1993); *Nwolise v. INS*, 4 F.3d 306 (4th Cir. 1993).

284. See *Goncalves v. INS*, 6 F.3d 830 (1st Cir. 1993); *Henry v. INS*, 8 F.3d 426 (7th Cir. 1993).

285. Although the circuits are splitting, the U.S. Supreme Court has been reluctant to take cases in this area of the law. See, e.g., *Nwolise*, 4 F.3d 306, cert. denied, 127 L. Ed. 2d 82 (1994); *Katsis*, 997 F.2d 1067, cert. denied, 127 L. Ed. 2d 93 (1994); *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993); *Chiravacharadhikul v. INS*, 645 F.2d 248 (4th Cir. 1981), cert. denied, 454 U.S. 893 (1981).

286. 990 F.2d 1142 (9th Cir. 1993).

287. *Butros*, 990 F.2d at 1145.

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Until Congress enacts legislation directly providing § 212(c) type relief from deportation, or until the United States Supreme Court rules on the issue, this proposal is the most sensible construction of § 212(c).

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